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THOMAS JOHNSON

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

THOMAS JOHNSON,  
  
Plaintiff,  
  
v.  
  
CONTEMPORARY INFORMATION  
CORPORATION, a California Corporation, and  
DOES 1-25,  
  
Defendants.

Case No.: 3:21-cv-05802-JD

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT CONTEMPORARY  
INFORMATION CORPORATION'S  
MOTION TO DISMISS**

Hearing Date: October 4, 2021  
Time: 9:30 a.m.  
Location: Courtroom C, 15th Floor

Hon. James Donato

## I. INTRODUCTION

Plaintiff's complaint states a claim upon which relief may be granted. Defendant violated the law when it assembled and sold a screening report to Plaintiff's prospective employer, which falsely labeled Plaintiff as a registered sex offender and criminal, with a prior conviction for possession of child pornography. Defendant's report was inaccurate because it was patently incorrect—Plaintiff is not a registered sex offender, nor has he ever been convicted of possession of child pornography. In fact, court records that are easily accessible online confirm that the actual registered sex offender and criminal has a different middle name and date of birth than Plaintiff.

Defendant's arguments in support of dismissal fail. Specifically, Defendant's effort to disavow liability by pointing to language on the report that simultaneously (and falsely) proclaims that Defendant both uses "industry best practices" and that the user should doublecheck Defendant's work by doing its own comparison of original records to the consumer's information runs counter to the FCRA's requirement that consumer reporting agencies, not end users, must use reasonable procedures to ensure "maximum possible accuracy" in reports. Defendant's claim that Defendant did not cause Plaintiff's damages because Plaintiff's prospective employer should or could have discovered Defendant's error fails for the same reason. And, Defendant's efforts to stretch the Eleventh Circuit's decision in *Erickson v. First Advantage Background Servs. Corp.*, 981 F.3d 1246, 1251 (11th Cir. 2020) to encompass this case are misguided. *Erickson* is not the law in the Ninth Circuit, involved substantially different facts and language, was decided after a trial, and contains an explicit note that the opinion should not be used in the way proposed by Defendant. *Erickson*'s fundamental premise is also contrary to the purpose of the FCRA. Defendant's motion should be denied.

## II. RELEVANT FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

On or about November 9, 2020, Plaintiff applied for a full-time employment position with a property management company operating in the greater Oakland area. Dkt. 1-2 (Compl. ¶¶ 27-28). On or about November 12, 2020, after Plaintiff worked a full-day tryout shift, the property management company notified Plaintiff that he was hired and was scheduled to begin his full-time

1 employment on November 16, 2020. *Id.*, ¶¶ 30-31. The company requested a copy of Plaintiff's  
 2 driver's license and his Social Security number to request his background screening report prior to  
 3 his official start date. *Id.*, ¶ 31.

4 On November 13, 2020, the property management company requested Plaintiff's background  
 5 screening report from Defendant. *Id.*, ¶ 35; Dkt. 9-2. That same day, Defendant completed Plaintiff's  
 6 background screening report, which contained sex offender registration information from the Virginia  
 7 Sex Offender Registry and two criminal convictions for Possession of Child Pornography from  
 8 Roanoke County, Virginia. Dkt. 1-2 (Compl. ¶¶ 36-39); Dkt. 9-2. Neither the sex offender registration  
 9 records and information nor the Possession of Child Pornography criminal convictions belong to  
 10 Plaintiff. Dkt 1-2 (Compl. ¶¶ 40-41). In fact, public record confirms that Plaintiff is not a Registered  
 11 Sex Offender and has never been charged or convicted of a sex-related crime. *Id.*, ¶ 42. A cursory  
 12 review of the criminal records as reported by Defendant in Plaintiff's background screening report,  
 13 and as reported in the widely available underlying public court records from Roanoke County Circuit  
 14 Court in Virginia, confirms the records belong to an unrelated consumer, Registered Sex Offender  
 15 Thomas *Eugene* Johnson. *Id.*, ¶ 43; Dkt. 9-2 (emphasis added). The discrepancies that should have  
 16 caused Defendant to realize Plaintiff is not the same person as Registered Sex Offender Thomas  
 17 Eugene Johnson include the following:

- 18 a) Plaintiff's legal name is "Thomas Johnson" (no middle name) and the sex offender  
 19 registration information and court records belong to a "Thomas *Eugene* Johnson," which  
 20 is indicated both on the face of the background screening report and in the widely available  
 21 Virginia Sex Offender Registry and underlying public court records from Roanoke County  
 22 Circuit Court;
- 23 b) Plaintiff's full date of birth is indicated on the first page of the background screening  
 24 report. It is not the same month or day as the date of birth for Registered Sex Offender  
 25 Thomas Eugene Johnson's date of birth, which is indicated in the available underlying  
 26 public court records from Roanoke County Circuit Court;
- 27 c) Plaintiff's address information and history, which is stated in pages 4 through 7 of the  
 28 background screening report, confirms that Plaintiff currently resides in Oakland,  
 California and did not live in Vinton, Virginia when Registered Sex Offender Thomas  
 Eugene Johnson resided in Vinton and committed and was convicted of the sex offenses  
 in 2012 and 2013, respectively; and
- d) Plaintiff has *never* been charged or convicted of a sex-related crime.

Dkt. 1-2 (Compl. ¶ 43(a-d)); ECF No. 9-2. In addition to the sex offender registration information and

1 stigmatizing criminal convictions that do not belong to Plaintiff, Defendant's background screening  
2 report regarding Plaintiff included the following language (hereafter "Disavowal"):

3 The reporting of criminal records varies according to restrictions placed on reporting  
4 by the different court jurisdictions. While industry best practices has been applied in  
5 the attempt to accurately match and report the following information, the end user  
6 should cross check the applicant supplied information with the date of birth, middle  
7 name, physical descriptors and geographical areas where the applicant has lived to  
8 determine a positive match. Any criminal records listed herein must be carefully  
9 reviewed by the end user of this report prior to making any decision. If you need  
10 assistance please call 800-288-4757 x1.

11 Dkt. 9-2.

12 On or about November 14, 2020, the property management company rescinded Plaintiff's  
13 offer of employment as a direct result of the criminal record information contained within the  
14 background screening report Defendant prepared regarding Plaintiff. Dkt. 1-2 (Compl. ¶¶ 46 & 54).  
15 After finally obtaining a copy Defendant's background screening report from the property  
16 management company's owner, Plaintiff disputed the inaccurate information in the report with  
17 Defendant on December 1, 2020. *Id.*, ¶¶ 49-51. On December 2, 2020, Plaintiff received email  
18 correspondence from Defendant's Director of Compliance confirming that it had reinvestigated his  
19 dispute and removed the sex offender registration information and criminal records from his report.  
20 *Id.*, ¶ 52. An updated copy of Defendant's report confirmed the status of the "Nationwide Criminal,  
21 Sex Offender, OFAC & Interpol Scan of Best Available Databases" section indicated: "No Criminal  
22 Activity and Sex Offender Hits Found in U.S. with Available Databases." *Id.* By the time Defendant  
23 completed its reinvestigation and corrected Plaintiff's report, the property management company was  
24 no longer interested in considering Plaintiff for employment. *Id.*, ¶ 53. Defendant's false report cost  
25 Plaintiff a promising and well-paying job opportunity; Plaintiff was set to earn approximately \$40.00  
26 per hour working full-time on the Maintenance Team. *Id.*, ¶ 55. Due to Defendant's failings, Plaintiff  
27 was unemployed for approximately two months thereafter. *Id.*, ¶ 56.

28 Plaintiff filed this lawsuit on June 25, 2021 in Alameda County Superior Court, alleging  
claims against Defendant for its negligent and/or willful failure to maintain reasonable procedures to  
assure maximum possible accuracy of the information contained in Plaintiff's background screening

report, in violation of 15 U.S.C. § 1681e(b) and its analog, Cal. Civ. Code § 1786.20(b). *Id.*, ¶¶ 59-73. Defendant removed this case to this Court on July 28, 2021. Dkt. 1.

### III. LEGAL STANDARD

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires the complaint to provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” To meet that rule and survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This calls for enough “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility analysis is “context-specific” and “requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. All factual allegations set forth in the complaint “are taken as true and construed in the light most favorable to [p]laintiffs.” *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

### IV. ARGUMENT

The FCRA “was crafted to protect consumers from the transmission of inaccurate information about them” and the FCRA’s “consumer oriented objectives support a liberal construction of the FCRA.” *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Section 1681e(b) of the FCRA and its analog, Cal. Civ. Code § 1786.20(b) of the ICRAA, both require that “[w]hen a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”

“In order to make out a prima facie violation under § 1681e(b), a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information.” *Guimond*, 45 F.3d at 1333. “The reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases.” *Id.* California Civil Code § 1786.20(b), the ICRAA provision under which Plaintiff has also alleged a claim, uses identical language to § 1681e(b) of the FCRA. Cal. Civ. Code § 1786.20(b) (investigative consumer

1 reporting agency “shall follow reasonable procedures to assure maximum possible accuracy....”)   
 2 Therefore, Plaintiff’s ICRAA claim is to be analyzed in line with the FCRA case law interpreting   
 3 § 1681e(b). *See Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169, 1176 (9th Cir.   
 4 2019) (construing the law in the FCRA and ICRAA to be identical).

5 To determine whether a consumer report is inaccurate within the meaning of the FCRA, the   
 6 court must find the consumer report is (1) “patently incorrect” or (2) “it is misleading in such a way   
 7 and to such extent that it can be expected to adversely affect credit decisions.” *Gorman v. Wolpoff &   
 8 Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009).

9 To create an issue of fact as to causation, a plaintiff must produce evidence that the alleged   
 10 inaccurate entry was a “substantial factor” in the denial of credit, adverse credit, or other harm.   
 11 *Bradshaw v. BAC Home Loans Servicing, LP*, 816 F. Supp. 2d 1066, 1075 (D. Or. 2011); *see also*   
 12 *Fregoso v. Wells Fargo Dealer Servs., Inc.*, No. CV 11-10089 SJO AGRX, 2012 WL 4903291, at \*7   
 13 (C.D. Cal. Oct. 16, 2012); *see also Gorman*, 584 F.3d at 1174 (9th Cir. 2009) (holding evidence that   
 14 the creditors denied the plaintiff credit or offered higher interest rates due to the delinquencies in the   
 15 report was sufficient to establish causation and damages).

16 **A. Plaintiff Has Sufficiently Plead That Defendant’s Background Screening**   
 17 **Report Is Patently Incorrect.**

18 A consumer report is inaccurate if it is “patently incorrect.” *Gorman*, 584 F.3d 1147 at 1163.   
 19 Accuracy under the FCRA requires more than “merely allowing for the possibility of accuracy.”   
 20 *Cortez v. Trans Union, LLC*, 617 F.3d 688, 709 (3d Cir. 2010). Indeed, there is a “dramatic” difference   
 21 between mere “accuracy” and “maximum possible accuracy.” *Id.* Simply allowing for some chance   
 22 or possibility of accuracy is insufficient. *Id.* The second prong of the court’s “accuracy” analysis is   
 23 whether a consumer report “is misleading in such a way and to such extent that it can be expected to   
 24 adversely affect credit decisions.” *Gorman*, 584 F.3d 1147 at 1163. “A consumer report that contains   
 25 *technically* accurate information may be deemed ‘inaccurate’ if the statement is presented in such a   
 26 way that it creates a misleading impression.” *Id.* (emphasis in original). “There are, of course, inherent   
 27 dangers in including any information in a credit report that a credit reporting agency cannot confirm   
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1 is related to a particular consumer. Such information is nearly always ‘used or expected to be used or  
2 collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s  
3 eligibility for ... credit.’ Allowing a credit agency to include misleading information as cavalierly as  
4 Trans Union did here negates the protections Congress was trying to afford consumers and lending  
5 institutions involved in credit transactions when it enacted the FCRA.” *Cortez*, 617 F.3d at 710.

6 Here, Plaintiff has sufficiently plead that Defendant’s background screening report is patently  
7 incorrect. *See* Dkt. 1-2 (Compl. ¶¶ 38, 40-43 & 46). Defendant incorrectly matched sex offender  
8 registration information from the Virginia Sex Offender Registry and two criminal convictions for  
9 Possession of Child Pornography to Plaintiff despite the fact that the information and records reported  
10 clearly belong to an unrelated consumer who does not share Plaintiff’s personal identifying  
11 information (other than first and last name and year of birth). *Id.*, ¶¶ 39; 40-43. Plaintiff is not on the  
12 Virginia Sex Offender Registry, is not a sex offender, and has never been charged or convicted of  
13 Possession of Child Pornography. *Id.*, ¶¶ 40-42. Widely available public records related to the  
14 criminal offenses reported by Defendant from Roanoke County Circuit Court—and the identification  
15 information contained on the face of the report—confirm that the sex offender registration information  
16 and convictions belong to an unrelated consumer, Registered Sex Offender Thomas Eugene Johnson.  
17 *Id.*, ¶ 43.

18 Prior to preparing Plaintiff’s report, Defendant had in its possession Plaintiff’s full name, full  
19 date of birth, Social Security number, and current address, all of which was provided by Plaintiff’s  
20 prospective employer. *See* Dkt. 9-2. Had Defendant taken its obligations under the FCRA and ICRAA  
21 seriously, it would have cross-referenced Plaintiff’s personal identifying information with the widely  
22 available public record information for Registered Sex Offender Thomas Eugene Johnson and  
23 discovered multiple important discrepancies prior to falsely including his sex offender registration  
24 information and criminal convictions in Plaintiff’s report. Dkt. 1-2 (Compl. ¶ 43).

25 First, Plaintiff’s legal name is “Thomas Johnson” and the sex offender registration information  
26 and court records belong to “Thomas Eugene Johnson,” which is clearly indicated both on the face of  
27 the report, in the Virginia Sex Offender Registry, and in the underlying public court records from  
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1 Roanoke County Circuit Court. *Id.*, ¶ 43(a). Second, Plaintiff’s date of birth is indicated on the first  
 2 page of the report and it is not the same month or day as Registered Sex Offender Thomas Eugene  
 3 Johnson’s date of birth, which is indicated in the widely available underlying public court records  
 4 from Roanoke County Circuit Court. *Id.*, ¶ 43(b). Third, Plaintiff’s address information and history is  
 5 stated in pages 4 through 7 of the report and confirms that Plaintiff did not reside in Vinton, Virginia  
 6 when Registered Sex Offender Thomas Eugene Johnson committed and was convicted of the sex  
 7 offenses in 2012 and 2013. *Id.*, ¶ 43(c). Despite all of this disqualifying personal identifying  
 8 information, Defendant admittedly based its match solely on first name, last name, year of birth, and  
 9 former state of residence only. Mot. at p. 7. When Plaintiff disputed his report, providing no  
 10 information beyond that which Defendant could and should have found on its own, Defendant  
 11 conceded the report was inaccurate and corrected it. Dkt. 1-2 (Compl. ¶¶ 52-53).

12 Defendant does not contest that it reported records that are not Plaintiff’s. Instead, Defendant  
 13 relies on the vague and confusing Disavowal in its report to try to avoid liability. Defendant’s effort  
 14 to disavow its legal obligations fails for multiple reasons. First, the Disavowal is *itself* false.  
 15 Defendant’s claim that “industry best practices has (*sic*) been applied in the attempt to accurately  
 16 match and report the following information[.]...” is simply not true. Dkt. 9-2 at p. 4. If Defendant’s  
 17 procedures were “industry best,” it would not have produced an inaccurate report in the first instance.  
 18 Had Defendant actually used “industry best practices,” it would have used *all* the personal identifying  
 19 information it had available to it, which would have resulted in the exclusion of obvious non-matches  
 20 such as the one it furnished to Plaintiff’s potential employer. Instead, Defendant used a patently  
 21 unreasonable matching procedure, which falls well short of 15 U.S.C. § 1681e(b)’s “maximum  
 22 possible accuracy” mandate, as well as “industry best practices.” Dkt. 1-2 (Compl. ¶¶ 44 & 57).

23 Second, Defendant’s attempt to shift the FCRA’s “reasonable procedures to assure maximum  
 24 possible accuracy” mandate on to the end user is contrary to law. Defendant cannot disavow its way  
 25 out of its own legal obligations. *Defendant*, not its customers, is the party that the FCRA requires to  
 26 “follow reasonable procedures to assure the maximum possible accuracy” of the information  
 27 contained in its reports. Defendant’s Disavowal states that “the end user should cross check the  
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1 applicant supplied information with the date of birth, middle name, physical descriptors and  
2 geographical areas where the application has lived to determine a positive match.” Dkt. 9-2 at p. 4.  
3 The FCRA’s statutory mandate requiring “maximum possible accuracy,” however, applies to  
4 consumer reporting agencies like Defendant, not end users. Thus, the language in the Disavowal is,  
5 on its face, contrary to the law, and its intended effect is to relieve Defendant of its statutory  
6 obligations.

7 Third, the language of Defendant’s Disavowal does not support the purpose for which  
8 Defendant seeks to use it here. Defendant’s Disavowal sends incoherently mixed messages, claiming  
9 both that it uses “industry best” practices, while simultaneously advising its users to take such basic  
10 steps as comparing the consumer’s name with the offender’s name, comparing the consumer’s date  
11 of birth with the offender’s date of birth, and comparing the consumer’s address history with the  
12 offender’s address history. While Defendant now seeks to avoid liability by focusing on the latter part  
13 of the Disavowal, it ignores the way in which its false boast undercut its subsequent advice. There is  
14 no reason to doublecheck the work of a consumer reporting agency using “industry best practices” on  
15 such basic tasks as name and date of birth matching. Moreover, the Disavowal nowhere states that  
16 the information itself is, or even may not be, accurate. Instead, it again (falsely) seeks to blame  
17 “restrictions placed on reporting by the different court jurisdictions” for its own incompetence. No  
18 such restrictions were present here. Defendant could, and should, have determined on its own that  
19 Plaintiff was not a match. Given this backdrop, there is no reason for the Court to conclude that  
20 Defendant should not be held liable for its failure to meet the legal obligations imposed on it by the  
21 FCRA.

22 Finally, Defendant’s Disavowal implicitly acknowledges the inadequacy of its own report.  
23 The Disavowal anticipates errors but characterizes them as the result of “restrictions placed on  
24 reporting by the different court jurisdictions.” Dkt. 9-2 at 4. The “restrictions” to which Defendant  
25 seeks to refer are far from transparent. To the extent “restrictions” is a euphemism for Defendant’s  
26 own failure to obtain full court records as a result of its choice to instead rely on sources that provide  
27 only partial information, this language too is misleading. If anything, the Disavowal indicates that  
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1 Defendant was *aware* that at the time it furnished the inaccurate report, it did not have complete data.  
2 Rather than falsely implying that this was the result of some court’s “restriction,” Defendant should  
3 have taken the additional steps required to ensure the report was maximally accurate. Courts have not  
4 placed restrictions on the accuracy of reporting, or more specifically, the accurate reporting of sex  
5 offender registry information and criminal records. In fact, consumer reporting agencies are required  
6 to ensure maximum possible accuracy in the preparation of consumer reports, which is defined  
7 liberally under the FCRA. The fact that the Virginia Sex Offender Registry does not provide a full  
8 date of birth in its publicly available data on the internet is not a “restriction” by court jurisdictions  
9 but a fact that indicates more research must be conducted (i.e. obtaining the court records associated  
10 with the sex offense, which do contain the full date of birth) before furnishing such consequential  
11 information. In fact, Registered Sex Offender Thomas Eugene Johnson’s month and day of birth, both  
12 of which do not match Plaintiff’s, are readily available online through the Virginia Judiciary online  
13 case records. All Defendant had to do was visit an additional website. In sum, under the standard  
14 established in *Gorman*, Plaintiff has sufficiently plead that Defendant’s report is patently incorrect  
15 and is therefore in violation of the FCRA, 15 U.S.C. § 1681e(b) and ICRAA, Cal. Civ. Code §  
16 1786.20(b).

17 **B. *Erickson* Is Not Controlling.**

18 Defendant relies almost entirely on the Eleventh Circuit’s decision in *Erickson v. First*  
19 *Advantage Background Services Corp.* to support its argument that because of the language included  
20 in its Disavowal, Plaintiff’s report was not inaccurate or misleading by the standard of § 1681e(b).  
21 *Erickson* is, of course, not binding on this Court. But even if were, the Court should not follow it. The  
22 facts and procedural posture of *Erickson* differ in important ways from those presented here. The  
23 language of the opinion itself states that its holding should not be extended to vague efforts to avoid  
24 liability through means such as the Disavowal. And, finally, even if the Court were to find it factually  
25 similar (it is not), procedurally similar (it is not), and applicable (it is not), *Erickson*’s fundamental  
26 premise is flawed, and the Court should not follow it.

27 First, *Erickson* is readily distinguishable on its facts. In *Erickson*, the end user of the consumer  
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1 reports, Little League, contracted with background check company First Advantage to obtain  
2 background reports on its applicants. 981 F.3d at 1248. In an intentional attempt to cast a broad net,  
3 Little League’s agreement with First Advantage specified that First Advantage would search for sex-  
4 offender records using only an applicant’s first and last name in any jurisdictions where First  
5 Advantage’s records database lacked complete dates of birth. *Id.* at 1249. If a name-only search  
6 returned a result, Little League would need to review available demographic data from the relevant  
7 State’s website before determining that a sex-offender record actually belonged to an applicant. *Id.*  
8 At the direction of Little League, First Advantage searched its database using Erickson's identifying  
9 information and did not find any matching criminal records. *Id.* But it did find a sex-offender record:  
10 a “Keith Dodgson” in Pennsylvania (which, at the time, matched plaintiff’s first and last name). *Id.*  
11 That match was obtained by a name-only search because the database did not include the sex  
12 offenders’ complete dates of birth. *Id.* After identifying the sex-offender record that matched  
13 Erickson’s (then Dodgson’s) name, the report stated “This Record is matched by First Name, Last  
14 Name ONLY and may not belong to your subject. Your further review of the State Sex Offender  
15 Website is required in order to determine if this is your subject.” *Id.* The report then directed Little  
16 League to Pennsylvania’s sex-offender data to compare the “demographic data and available  
17 photographs,” noting that Little League might “conclude that the records do not belong to” Erickson  
18 (then Dodgson). *Id.*

19 The Eleventh Circuit held that First Advantage’s report was factually correct because it  
20 contained a notice that accurately informed Little League it was a name-only search and cautioned  
21 that the record might not be the plaintiff’s. *Id.* at 1252. The court reasoned that the report never  
22 assigned the sex-offender record to the plaintiff, and the report specifically suggested that the record  
23 might not be connected to plaintiff. *Id.* “Simply put, the report was what it said it was—an alert that  
24 someone by the name of Keith Dodgson had a Pennsylvania sex-offender record.” *Id.*

25 Here, Defendant’s consumer report and Disavowal are plainly distinguishable from the  
26 consumer report prepared by First Advantage in *Erickson*. Defendant’s Disavowal does not alert the  
27 end user that the records contained in Plaintiff’s report were matched by “First Name, Last Name  
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ONLY,” nor does it state that the records reported may not belong to Plaintiff. Dkt. 9-2 at p. 4. Defendant’s Disavowal also fails to communicate that further review of the State Sex Offender Website is required to determine if the records belong to Plaintiff. *Id.* Instead, the Disavowal here contains a false and misleading *assurance* that Defendant applied “industry best practices” to accurately match and report the criminal record information. *Id.*

Second, *Erickson* is distinguishable based on its procedural posture. Evidence in the trial record about the nature of the communications between the consumer reporting agency and the employer was critical in *Erickson*, as it established that the consumer reporting agency and the user were both aware of exactly what the report represented—not a match, but only a possible match, and one that had been explicitly directed by the user and that the user had agreed to further investigate. In *Erickson*, the plaintiff developed a full record that included the nature of the disclaimer provided to Little League – sufficient for the Court to conclude that the report was “what it said it was.” 981 F.3d at 1252. Here, there is no evidence of the parties’ prior communications or agreement and the report itself contains a (false) boast about the “industry best” procedures used to prepare it, clearly suggesting that, unlike Little League, the user here had every reason to believe the record was a match to Plaintiff, not merely a record that happened to contain the same name.

Third, even on its own terms, *Erickson* should not be extended to apply here. The *Erickson* court was careful to limit its decision to the specific facts presented in that case and warned consumer reporting agencies that they could not disavow their way out of the FCRA: “[t]o be sure, this is not a license to caveat one’s way out of liability for an affirmatively misleading report. . . Nor will vague equivocations like ‘the criminal history cited may not be 100 percent accurate’ suffice to save an otherwise misleading report.” 981 F.3d at 1253. The *Erickson* court further emphasized that its decision was based on the unique facts of the case and the Little League’s evident understanding of what the report meant and how it was to be used. *Id.* at 1253.

Here, Defendant’s report was inaccurate and misleading. Plaintiff’s employer would have had no reason to doubt the accuracy of the report because it was not informed that the sex offender records were a “name-only” match or that it was required to review the State Sex Offender Website to

determine whether the records were accurately matched to Plaintiff. Instead, the face of the report assures the employer that Defendant used “industry best practices” to “accurately match and report the following information[.]....” Dkt. 9-2 at p. 4. Thus, there is nothing in Plaintiff’s report that would make a reasonable user understand that the records reported by Defendant belonged to anyone other than Plaintiff. Indeed, this is precisely what occurred; Plaintiff’s employer thought the records belonged to Plaintiff and withdrew his job offer as a result. It should not be surprising that under these circumstances, the employer concluded the report furnished was about the Plaintiff because that was what the employer ordered. Plaintiff would plausibly states a claim because the inclusion of the sex offender record in the report left the misleading impression that the information was about Plaintiff. *See Gorman, supra*; *see also Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 40 (D.C. Cir.1984) (“Certainly reports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer ....”); *Kianpour v. Wells Fargo Bank, N.A.*, No. CV1701757SJOGJSX, 2017 WL 8292776, at \*11 (C.D. Cal. July 17, 2017).

Finally, even on the limited terms on which it was decided, Plaintiff submits that *Erickson* was wrongly decided. Essentially, the Eleventh Circuit allowed the consumer reporting agency and one of its customers to contractually agree that the FCRA’s baseline requirement of reasonable procedures to assure maximum possible accuracy would not apply to the reports issued to Little League. While the Eleventh Circuit framed its analysis in terms of a close reading of the disclaimer on the report and concluded that the report was technically true because it disclosed that the match in that case was based on name only, the Eleventh Circuit lost sight of the fundamental purpose of the FCRA: to protect *consumers*. Interpreting the FCRA to allow consumer reporting agencies to *contract* their way out of their statutory obligations by agreeing that end-users can instead contractually assume those obligations is fundamentally no different than allowing consumer reporting agencies to *disclaim* their way out of those obligations in the first place. The whole point of the FCRA is to ensure that consumer reporting, as an industry, is regulated in such a way as to ensure that consumer reports are generated using reasonable procedures designed to ensure maximum possible accuracy for *consumers*. *Erickson* creates the all too real specter of a world where consumers cannot obtain redress

for information that harmed them because the entities who disseminated that information using unlawful unreasonable procedures (such as partial name matching only ) can avoid liability by simply saying “but we told you what our unreasonable procedures were, therefore our report is true because, using those unreasonable procedures, you are a match” This is Kafkaesque and the Eleventh Circuit should have never countenanced this legalistic sophistry. The Court need not share Plaintiff’s fundamental disagreement with *Erickson*, as the factual and procedural distinctions between the two cases, and *Erickson*’s own attempt to limit its scope, are sufficient to render it inapplicable here. However, the fact that Erickson’s fundamental premise would allow consumer reporting agencies to contract away legal obligations imposed by Congress in order to protect consumers bears careful consideration by this Court.

Here, Plaintiff has plead an inaccuracy in Defendant’s report, though it is also plainly misleading. That is all he is required to do. Thus, Defendant’s motion should be denied.

**C. Plaintiff Has Sufficiently Plead That Defendant’s Inaccurate Report Caused His Injuries.**

Plaintiff has sufficiently plead that Defendant’s inaccurate background screening report, which was used for employment purposes, caused his injuries. Dkt 1-2 (Compl. ¶¶ 54-56, 58, 64 & 73). Plaintiff plausibly claimed that Defendant’s failure to follow reasonable procedures in the preparation of his background screening report caused his report to be inaccurate which in turn caused him actual damages, including but not limited to, loss of employment opportunities, lost wages, reputational damage, and emotional distress. *Id.*, ¶ 58. It is not the Court’s responsibility to decide the merits of the claims at this stage in the litigation. Rather, the Court must only determine whether Plaintiff’s Complaint states a claim that is plausible on its face.

Defendant argues unpersuasively that even if Plaintiff’s report was inaccurate, the unlawful conduct of the property management company that requested Plaintiff’s report—not Defendant’s reporting—was somehow the cause of Plaintiff’s alleged injuries. Mot. at p. 7. Defendant’s argument is old wine in a new bottle—yet another attempt to argue that someone other than Defendant had an obligation to identify and correct Defendant’s errors.

1 First, Defendant's argument that it somehow matters that the property management company  
 2 told Defendant the report was for tenant screening purposes but then used it for employment screening  
 3 purposes fails. To begin with, Defendant's argument relies on unsupported factual assertions not  
 4 contained in the Complaint. There is zero factual support for Defendant's contention about what the  
 5 employer represented to Defendant, and the Court therefore should disregard Defendant's argument  
 6 entirely. But regardless, this unsupported assertion is also irrelevant. Users of consumer reports must  
 7 certify *a* permissible purpose to the consumer reporting agency form which they are obtaining reports,  
 8 but are not limited to only that purpose. Instead, a user may obtain a report for *any* permitted purpose  
 9 under the statute. Employment purposes are clearly allowed. *See Daniel v. DTE Energy*, 2013 WL  
 10 4502151 (E.D. Mich. Aug. 22, 2013) (permissible purpose is a complete defense to claims of  
 11 obtaining a consumer report under false pretense), *aff'd on other grounds*, 592 Fed. Appx. 489 (6th  
 12 Cir. 2015).

13 Second, Defendant's effort to shift blame to its employer-client and Plaintiff fails. What  
 14 Defendant appears to be arguing is that Plaintiff's prospective employer should have told Defendant  
 15 the report was for employment purposes, and then Defendant would have either issued a different  
 16 report or somehow ensured that Plaintiff had an opportunity to dispute *before* permanently losing the  
 17 job. (ECF 9-1 at 8). Again, however, Defendant's counterfactual assertions about the chain of events  
 18 that transpired find no support in Plaintiff's Complaint. To the contrary, Plaintiff alleges that he did  
 19 dispute, but that by the time his dispute had been handled by Defendant, the employer was still  
 20 unwilling to hire him. Complaint ¶¶ 53-56.

21 But even if Defendant's counterfactual assertions were supported, they are a red herring. The  
 22 FCRA does not limit liability to a single actor. A consumer reporting agency and a user of a consumer  
 23 report may both be liable for violations of the statute, which imposes different responsibilities on  
 24 each. Here, one cause of Plaintiff's injuries is Defendant's inaccurate report. Despite Defendant's  
 25 assertion that the cause of Plaintiff's injury is not its inaccurate report, but its client's failure to figure  
 26 out that the report was inaccurate, there is nothing in the FCRA that creates an obligation for users of  
 27 consumer reports to be savvy, or to sift through reports to separate wheat from chaff. *Defendant's*  
 28

1 obligation to comply with the FCRA's statutory mandate of "reasonable procedures to assure  
2 maximum possible accuracy" is fixed, and it does not change based on the potential naivete of an end  
3 user. As 15 U.S.C. § 1681e(b) expressly states, "*Whenever* a consumer reporting agency prepares a  
4 consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the  
5 information concerning the individual about whom the report relates." (emphasis added). There is no  
6 parallel requirement imposed on users of consumer reports. Thus, Defendant's argument that  
7 Plaintiff's alleged injuries were caused by the property management company because it allegedly  
8 failed to uncover Defendant's error is misguided. Regardless, this is not an issue that can be resolved  
9 at the pleadings stage.

10 Because Plaintiff has sufficiently plead that Defendant's inaccurate report caused his alleged  
11 injuries, Defendant's motion should be denied.

12 **V. CONCLUSION**

13 For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's  
14 motion and allow this case to proceed to discovery.

15  
16  
17 Dated: August 18, 2021

Respectfully submitted,

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20 /s/ Hans Lodge

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